77-1779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977
No. A-957

AUGUSTINE PARIS, JR.,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977
NO. A-9573

AUGUSTINE PARIS, JR.,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Augustine Paris, Jr., prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, decided and entered April 18, 1978 affirming the judgment of conviction rendered against petitioner in the United States District Court for the Southern District of New York on December 16, 1977 convicting petitioner of conspiracy to violate Title 21 U.S.C. 173, 174, 846 and 963 (illegal importation and distribution of narcotics) and violation of Title 28 U.S.C. 7201, two counts (income tax evasion).

OPINION BELOW

On April 18, 1978 the Court of Appeals for the Second Circuit affirmed the judgment of conviction in the attached summary opinion (see Appendix A).

JURISDICTION

The judgment and order of the United States Court of Appeals dated April 18, 1978. Jurisdiction of this Court is invoked, made and conferred under Title 28 U.S.C. 1257(3) and Rule 22(2) of the Rules of the Supreme Court of the United States.

QUESTIONS INVOLVED

A. Should the archaic and eminently unfair legal concept of withdrawal of the conspiracy through publication be retired?

B. Did the inordinate 52 month pre-indictment delay and the joining of narcotics conspiracy charges foreclose a fair trial with two counts of income tax evasion?

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

Fifth Amendment

. . . nor be deprived of life, liberty, or property without due process of law . . .

Federal Rules of Criminal Procedure Rule 8: Joinder of Offenses of Defendants a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate court for each offense if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 14. Relief From Prejudicial Joinder. If it appears that a defendant . . . is prejudiced by a joinder of offenses . . ., the court may order . . . separate trials of counts . . .

Title 21 USC

§173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; . . .

Title 21 USC

§174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.

Title 21 USC

§846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 21 USC

§963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 26 USC
Section 7201 Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

Petitioner was indicted on April 11, 1977 on charges of narcotics conspiracy and income tax evasion. A trial on these charges commenced October 19, 1977. Petitioner's claimed involvement in the events upon which the narcotics conspiracy charge was based were confined to the period May 1970 to April 1971. According to a prosecution witness named Hamman, petitioner was the recipient in New York of narcotics shipped from Hong Kong via Vancouver, British Columbia and Seattle. A first shipment was made to New York in May 1970 by Hamman's partner, Richard Busby. The second and third trips by Merle Mjelde, testifying for the prosecution that he made delivery to "Jack." On Mjelde's initial trip, a mere telephone call was sufficient to arrange delivery. A more elaborate procedure was employed the second time—before delivery could be made on this last shipment of narcotics to New York a procedure of matching halves of a dollar bill was necessary although delivery of this last shipment was to the same person, "Jack" who was identified only as tall, thin, a light skinned negro or a dark skinned Caucasian, graying hair; a description not incompatable with that of petitioner.

With cancellation of a contemplated delivery to New York in April 1971 (Mjelde ready with his half of a one

dollar bill) all importing operations ceased. Hamman and Busby met each other only occasionally and the importer, Wilson, made no more shipments. In June of 1972 Busby requested Hamman inquire of Wilson whether he could import narcotics. No mention is made in the testimony of the intended recipient or the destination of the narcotics. It was this June 1972 importation resulting in the arrest of Wilson, Busby, Hamman that is the only transaction within the five (5) year period of limitation. Testimony of a claimed similar act a sale of narcotics between petitioner and Lorenzo Cancio in August of 1971 was likewise beyond the period of limitation.

It is claimed that Cancio's testimony provided the additional information needed to prepare a viable narcotics prosecution against petitioner. That testimony was available to the prosecution in 1974. However, the prosecution was delayed until April of 1977 in order to allow an income tax evasion case being prepared by the Internal Revenue Service to wend its way through the bureaucracy. Thus on April 11, 1977, six years after the acts claimed to constitute narcotics conspiracy occurred, petitioner was brought to account. A trial was not to commence until October 19, 1977; six months later.

REASONS FOR GRANTING THE WRIT

I

It is the duty of this the highest Court in the land, to undo the perversion of logic which has created a conspiracy in perpetuity only to be terminated upon a public airing. See *U.S. v. Borelli,* 336 F.2d 376 (2d Cir., 1964), *cert. denied sub nom; Cinquetrano v. U.S.,* 379 U.S. 960 (1965); *U.S. v. Panebianco,* 543 F. 2d 447 (2d Cir., 1976). Logic forecloses a finding that petitioner is accountable for conspiritorial activity in June of 1972. All the evidence in this case showed that petitioner ceased membership in

any purported conspiracy in April of 1971. It was then that a scheduled trip to New York was abruptly cancelled with all narcotics importations ceasing until June 1972. As to that transaction petitioner was not shown to have had any part in it. Only one interpretation of this evidence of cessation of activity in 1971 is possible. That the parties viewed their mutual dealings as having terminated. All their actions showed that the parties considered their mutual dealings at an end. The June 1972 transaction commenced an entirely new and separate undertaking which in no way involved petitioner. By no stretch or contortion of the evidence could testimony of petitioner's participation in the earlier transaction be extended to an agreement ad infinitum.

However, according to the trial court's charge to the jury as set forth below, the sole method of withdrawal from a conspiracy is by a public airing shown to have been received by each co-conspirator and understood by each to marking an end to the retiring members participation:

> "A conspiracy, once formed is presumed to have continued until its objectives are accomplished or there is an affirmative act of termination by its members.
>
> "So, too, once a person is found to be a member of a conspiracy, he is presumed to continue his membership until its termination, unless there is affirmative proof of withdrawal or disassociation.
>
> "You don't get out of the conspiracy simply by not doing anything for a while. The defendant contends that even if you find beyond a reasonable doubt that a conspiracy existed in February of 1970 to June of 1972 that he may have affirmatively withdrawn from the conspiracy prior to April 11, 1972. Unless the defendant produces affirmative evidence of this withdrawal from the conspiracy, the conspiracy is presumed to continue until the last overt act by any of the conspirators—such as making a clean breast of his involvement with the charges, or an indication of aban-

> donment to the other conspirators, reasonably calculated to reach their knowledge, and the burden of proving this withdrawal from the conspiracy is on the defendant, once they have proved that he is in the conspiracy—a matter for you to decide."

This charge a model for the Court of Appeals for the Second Circuit follows closely this Court's ruling in *Hyde v. U.S.*, 225 U.S. 347, decided in 1912 before an avalanche of conspiracy cases inundated the federal courts and burying defendants in criminal cases in its wake.

This charge placed upon petitioner the burden on demonstrating affirmatively his withdrawal from the claimed conspiracy; an unnecessary onorous burden all but impossible to achieve. Making a clean breast of his conspiracy would unquestionably result in petitioner's incarceration. An indication of withdrawal to co-conspirators is likely to incur a worse fate.

An eminently more logical alternative to the requirement of publication for withdrawal of a conspiracy has been put forth by Judge Hunter of the Third Circuit in *U.S. v. U.S. Gypsum Company*, 550 F. 2d 115 (3rd Cir., 1977).

> "Conduct inconsistent with the theory of continued adherence to the conspiracy."

Such a charge would permit a jury to find withdrawal from the circumstances and inferences in the case; inferences that a jury is permitted in finding an accused to be a member of a conspiracy.

II

A delay of 52 months—36 months devoted to amassing evidence of income tax evasion, where because of the delay petitioner is prevented from presenting testimony and documentary proof of innocence, is a deprivation of due process that this court should not tolerate. This Court's opinion *U.S. v. Lovasco,* 431 U.S. 783 (1977) did not grant the government a license to proceed with a reckless disregard of an accused's rights. It is inconceivable that this Court would permit the prosecutor to inordinately delay and strengthen its own case at the expense of a defendant by joining incompatible charges of income tax evasion with narcotics conspiracy and then argue that the delay was necessary to try all charges at one trial.

Only a most flagrant insensitivity to a defendant's right to a fair trial would encourage the Government to strengthen its own case, and relegate petitioner lost testimony of business associates who might have been able to testify the petitioner wore a beard on the occasion he was claimed to have been a clean shaven "Jack" but due to the passage of time cannot now remember if the beard was on or off due to a skin disease that afflicted petitioner about this time to the scrap heap "of possibility of prejudice." It is this persieved unlimited discretion that enabled the prosecutor to cleverly turn Mjelde's inability to identify "Jack" to an advantage by arguing that the identification was impossible due to the passage of time.

Obscured by the prosecutor's ingenious passage of time argument was the harm to petitioner's case due to his inability to destroy the credibility of a prosecution witness presented to testify to a similar act (narcotics sale) in late August or early September. Petitioner was in Portugal until August 22, 1971. His passport—turned over to the government at the pro-

secutor's request at the onset of the trial—showed petitioner's entry into the United States on August 22, 1971. A trial three years before, shortly after the witness Cancio identified petitioner, a more exact approximation might have been forthcoming. At the very least, petitioner would have had a viable argument that the reason for the inexact date was that Cancio suffered from a common ailment afflicting government informers—the desire to aid themselves at the expense of others without regard for the truth. Instead, the prosecutor prevailed with his ingenuous arguments that the weaknesses in the government's case was due to a lapse of memories caused by the passage of time (a delay created by the government—merging the income tax investigation to the narcotics conspiracy).

It was this merger that brought the prosecutor his greatest advantage; arguing to the jury that petitioner was "making a great deal of money in a very lucrative side business—the narcotics business." This argument invited the jury to speculate that the unreported monies were the products of a narcotics operation and the reason these monies were not reported was petitioner's fear of exposure. Instead of usual benefits of a joint trial, having all charges litigated in one trial, as contemplated in *U.S. v. Lovasco,* petitioner was harnessed to the two charges whose incompatibility could only result in a boot strap conviction.

A relatively weak income tax evasion case (claimed tax deficiency in 1970 for $8,000, 1971 $27,000; assuming a narcotics operation tax deficiency $11,794.35 in 1970 and $76,330.38 in 1971) and an extremely weak conspiracy case (involvement based on hearsay and whether petitioner was "Jack") resulted in a conviction on all counts.

Taking full advantage of the joinder the prosecutor browbeat a "lead" witness, petitioner's cousin Dr. Hewlett (a dentist) who had lent petitioner $5,000. Without a scintilla of proof the prosecutor sought to

damage petitioner's case by arguing to the jury that the $5,000 loan testified to by Dr. Hewlett "may very well have been for an interest in the heroin which was delivered in May 1970 from Seattle, the very first delivery." Separate trials of these antagonistic counts would have foreclosed the prosecutor questioning Dr. Hewlett concerning his purported involvement in the narcotics conspiracy as "Doc," a dentist with chemistry training referred to in Hamman's testimony. And in a narcotics conspiracy trial, the prosecution would not have been allowed such bad faith questioning. Only joinder conferred legitimacy on these wholly improper questions.

Joinder of these incompatable counts also necessitated an all or nothing choice; whether petitioner would testify or remain silent. Petitioner chose to testify. Cross examination was concerned mostly with the tax evasion charge; which, petitioner being confronted by a narcotics conspiracy charge, might wisely have relied on the prosecution's burden at trial.

It was the combining of the income tax case with the narcotics conspiracy count to the boot strap prosecution that allowed the jury to convict for income tax evasion because petitioner was not reporting income made in the narcotics business and to convict on the narcotics conspiracy because petitioner appeared to have more money available than he reported to the Internal Revenue Service.

Petitioner's conviction on all counts was the result of an unsupervised prosecutorial discretion to delay the narcotics conspiracy prosecution until petitioner could be saddled with the additional burden of explaining a claim of unreported income in a joint income tax evasion narcotic conspiracy trial. A defense of the indictment was not merely rendered more difficult by the combining of charges and the delay to allow the income tax evasion charges to wend its way through the IRS; it was rendered impossible.

CONCLUSION

This Court should grant petitioner's request for a writ of certiorari and entertain briefs and arguments on the merits.

Respectfully submitted,

LESTER ROSEN
Member of the Bar of the
United States Supreme Court

APPENDIX A—OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of April one thousand nine hundred and seventy-eight.

Present: HONORABLE IRVING R. KAUFMAN,
Chief Judge.
HONORABLE J. JOSEPH SMITH
HONORABLE ROBERT P. ANDERSON,
Circuit Judges,

UNITED STATES OF AMERICA,
Appellee,

v.

AUGUSTINE PARIS, JR.,
Defendant-Appellant.

78-1017

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment

of said District Court be and it hereby is affirmed.

1. As the district court determined, the delay in returning the indictment was not improper, but rather resulted from the government's determination that insufficient evidence existed to justify a prosecution. *See United States v. Lovasco,* 431 U.S. 783, 791 (1977). Moreover, appellant has failed to establish any actual prejudice, *see id.* at 789-90, resulting from the delay.

2. The statute of limitations does not begin to run until there has been a complete withdrawal from the conspiracy. *United States v. Borelli,* 336 F.2d 376, 388 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano v. United States,* 379 U.S. 960 (1965). Accordingly, evidence of the June 1972 narcotics transaction could properly demonstrate appellant's involvement within the five-year period of limitations. Moreover, the charge to the jury on withdrawal was fully in compliance with the law of this Circuit. *See id; United States v. Panebianco,* 543 F.2d 447, 453 (2d Cir. 1976).

3. Having failed to object to the joinder of the tax evasion and narcotics counts in the court below, appellant has waived his right to object to that joinder. *United States v. Green,* 561 F.2d 541, 543 (2d Cir. 1977).

We find no merit in any of the other claims raised by the appellant, and accordingly affirm.

s/ Irving R. Kaufman
Irving R. Kaufman, Chief Judge.

s/ J. Joseph Smith
J. Joseph Smith

s/ Robert P. Anderson
Robert P. Anderson,
Circuit Judges.

ENDORSEMENT

UNITED STATES OF AMERICA v. AUGUSTINE PARIS, JR., 77 Cr. 262 (GLG)

The motion for judgment of acquittal and dismissal of a portion of the indictment because of a violation of the defendant's due process rights is denied.

The motion is based upon pre-indictment delay with respect to the third count charging defendant with dealings in heroin. It is true that the narcotics conspiracy ended on or about June 12, 1972 with the arrest of the other co-conspirators in Seattle, Washington. At that time, the Government had a *prima facie* case against the defendant, but it was a rather weak one which probably would not have resulted in a conviction. The defendant contends that the prosecution put this case aside and set out to build a tax case against the defendant to support its claim of narcotic dealings. The affidavits filed on behalf of the Government belie this charge. It would appear that the narcotics case against Paris was not immediately pursued. In January of the following year (1973), he was found to be in possession of $36,000 cash which he had failed to report when returning to the United States after a trip to Portugal. Thereafter, and independent of the west coast prosecution, the tax investigation was commenced. In 1975, the Drug Enforcement Administration obtained information from an informant (one Lorenzo Cancio) who testified in this trial, indicating that the defendant was a major supplier of narcotics. Thereafter, the two separate agencies coordinated their investigations. There were the usual delays in the tax indictment as the defendant exhausted the many administrative remedies available to him. The only delay of any consequence was the period of about a year from the receipt of the case by the United

States Attorney's Office until indictment. The Court will take judicial notice of the fact that the Speedy Criminal Trial Act has placed an inordinate burden upon the prosecutors and the courts. The Assistant U.S. Attorney to whom this case was originally assigned prosecuted a couple of matters before me during the period that the indictment in this case was pending. In any event, this delay was not inordinate. The reasons for the delay did not violate " 'fundamental conceptions of justice which lie at the base of our civil and political institutions' " or offend " 'the community sense of fair play and decency.' "

Moreover, there has been a complete failure on the part of the defendant to establish any prejudice from the delay. While he speculates on the possibilities of producing other evidence had the case been tried several years ago, these are no more than speculations. The weakest part of the prosecution's case was the inability of the go-between, Merle Mjelde, to be able to identify the defendant. The defendant's appearance has changed greatly in the last five years. He now wears a beard regularly and has greying hair. The possibility of an identification five years ago would have been substantially greater, although there were indications that, even at that time, because of the conditions under which the witness had seen the defendant, he could not make an unequivocal identification. In any event, the defendant has established no prejudice.

The motion is in all respects denied.

SO ORDERED:
s/ Gerard L. Goettel

Dated: New York, N.Y.,
December 20, 1977.

APPENDIX B—JUDGMENT COMMITMENT ORDER

AUGUSTINE PARIS, JR.

December 16, 1977

WITH COUNSEL Lester Rosen, Esq.

PLEA—GUILTY, and the court being satisfied that there is a factual basis for the plea,

There being a verdict of GUILTY to Counts 1, 2 and 3.

Defendant has been convicted as charged of the offenses of Income Tax Evasion. (Title 26, United States Code, Section 7201). Conspiracy to violate Federal Narcotics Laws. (Title 21, United States Code, Sections 173, 174, 846 and 963).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO AND HALF (2-1/2) YEARS on each of Counts 1 and 2. TEN (10) YEARS on Count 3. Sentences to run concurrently with each other.

Defendant is FINED $5,000.00 on Count 1; $5,000.00 on Count 2, and $15,000.00 on Count 3, plus costs of prosecution on all counts. TOTAL FINES: $25,000.00 are to be paid or defendant to stand committed until fines are paid or he is otherwise discharged according to law.

Pursuant to the provisions of Section 841 of Title 21, United States Code, the defendant is placed on SPECIAL PAROLE for a term of TEN (10) YEARS to commence upon expiration of confinement.

Bail is increased to include a $50,000.00 Personal Recognizance Bond co-signed by his wife, along with the surety bond already posted. (This bond will supercede the existing $22,000.00 Personal Recognizance Bond only, when posted). (Bail to be posted within one week).

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

s/ Gerard L. Goettel
GERARD L. GOETTEL, U.S.D.J. Date 12/16/77

U.S. DISTRICT COURT FILED DEC 16 1977 S.D.N.Y.

No. 77-1779

In the Supreme Court of the United States

OCTOBER TERM, 1978

AUGUSTINE PARIS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 578 F.2d 1371 (table).

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1978. On May 15, 1978, Mr. Justice Marshall granted an extension of time to file a petition for certiorari to and including June 17, 1978. The petition for a writ of certiorari was filed on June 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's instructions about withdrawal from the conspiracy were proper.

2. Whether preindictment delay violated petitioner's due process rights.

3. Whether the joinder of tax-evasion and narcotics charges was proper.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of federal income tax evasion, in violation of 26 U.S.C. 7201, and one count of conspiracy to import and distribute heroin, in violation of 21 U.S.C. (1964 ed.) 173, 174 and 21 U.S.C. 846 and 963. Petitioner was sentenced to concurrent terms of two and one-half years' imprisonment on each of the tax evasion counts and ten years' imprisonment on the conspiracy count. In addition, petitioner was fined $5,000 on each tax-evasion count and $15,000 on the conspiracy count. The court of appeals affirmed (Pet. App. A).

The evidence adduced at trial showed that from February 1970 through June 1972 petitioner conspired with Richard Busby, William Hamman, James Wilson, and Merle Mjelde to import heroin from Hong Kong, and to distribute the heroin in New York. In February 1970, Wilson asked Hamman to find a buyer for heroin (Tr. 435-436).[1] Hamman then

[1] "Tr." designates the trial transcript.

contacted Busby, who told him that petitioner could buy as much heroin as Wilson could supply (Tr. 436-437). Hamman, in turn, contacted Wilson and told him to begin smuggling heroin into the United States (Tr. 436-437). Six shipments of heroin followed.

In May 1970, Wilson delivered the first shipment (100 ounces of pure heroin) to Hamman, who, in turn, delivered the heroin to Busby. Busby sold the shipment to petitioner, who told him that he wanted larger shipments in the future (Tr. 437-442, 498). In February 1971, Hamman and Wilson bought 50 ounces of heroin in Hong Kong (Tr. 443-448). Hamman stored this second shipment until it could be combined with a third shipment of 150 ounces in March 1971 (Tr. 449-457). Hamman and Busby hired Mjelde to deliver the second and third shipments to petitioner in New York (Tr. 452-459, 651-665). In March 1971, Wilson obtained a fourth shipment of 200 ounces of heroin, which he combined with a fifth shipment of 375 ounces (Tr. 463-466). Hamman and Busby again instructed Mjelde to deliver the combined shipments to petitioner (Tr. 466-478), who paid Mjelde $45,000 (Tr. 672-681).

There were no additional heroin shipments from Hong Kong between April 1971 and June 1972. As a result of continued pressure by Busby to arrange further shipments, Hamman arranged with Wilson in June 1972 to obtain 250 ounces of heroin (Tr. 478-483, 546). This last smuggling effort failed when Wilson was arrested while in possession of the

heroin (Tr. 553-558).[2] Wilson then agreed to cooperate with customs agents in a controlled delivery to his co-conspirators (Tr. 559-563). Wilson subsequently met with Hamman, who told him to leave the heroin in the trunk of a car parked in a particular garage (Tr. 481-484). Pursuant to the instructions of customs agents, Wilson put sugar, not heroin, in the car trunk (Tr. 565-567). Busby asked his girlfriend, Lenze, to pick up the car and to drive it to her home, which she did (Tr. 598-599). The next day customs agents arrested Hamman and Lenze; they found a slip of paper with petitioner's home telephone number in Lenze's pocketbook (Tr. 583, 602-603, 613), which ultimately led to petitioner's arrest after continued investigation.

While petitioner was receiving heroin from Wilson, he expended from taxable sources at least $75,807 in 1970 and $204,404 in 1971. He reported taxable income of only $23,651 in 1970 and $31,376 in 1971. Thus, petitioner failed to report taxable income of $43,896 in 1970 and $159,373 in 1971. Accordingly, the government's evidence showed that petitioner evaded at least $11,794 of federal income taxes in 1970 and $76,330 of taxes in 1971 (Tr. 889-961).

At trial, petitioner testified that he had never engaged in the narcotics business (Tr. 959-961). He claimed that the money for his large cash expenditures was derived, in part, from gambling winnings, which he did not know were reportable income (Tr.

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[2] This shipment of heroin had a street value of $6 million (Tr. 578).

1007-1009, 1080-1081), and that in 1970 he found $47,000 in cash while cleaning his attic (Tr. 943-945).

ARGUMENT

1. Petitioner contends (Pet. 6) that the trial court's instructions were improper because they indicated that "the sole method of withdrawal from a conspiracy is by a public airing shown to have been received by each co-conspirator and understood by each."

This claim is without foundation. As petitioner concedes (Pet. 7), the district court instructed the jury, in accordance with this Court's decision in *Hyde* v. *United States*, 225 U.S. 347 368-370 (1912), in the following terms (Tr. 1253):

> A conspiracy, once formed, is presumed to have continued until its objectives are accomplished or there is an affirmative act of termination by its members.
>
> So, too, once a person is found to be a member of a conspiracy, he is presumed to continue his membership until its termination, unless there is affirmative proof offered of withdrawal or disassociation.
>
> You don't get out of a conspiracy simply by not doing anything for a while. The defendant contends that even if you find beyond a reasonable doubt that a conspiracy existed in February of 1970 to June of 1972, that he may have affirmatively withdrawn from the conspiracy prior to April 11, 1972. Unless the defendant produces affirmative evidence of his withdrawal from the

> conspiracy, the conspiracy is presumed to continue until the last overt act by any of the conspirators—such as making a clean breast of his involvement with the charges, or an indication of abandonment to the other co-conspirators, reasonably calculated to reach their knowledge, and the burden of proving this withdrawal from the conspiracy is on the defendant, once they have proved that he was in the conspiracy—a matter for you to decide.

Petitioner's reliance upon *United States* v. *United States Gypsum Co.*, 550 F.2d 115 (3d Cir. 1977), affirmed, No. 76-1560 (June 29, 1978), is therefore misplaced. In that case this Court found that an instruction that required the defendant to prove notification "to each other member of the conspiracy" to the effect that "he will no longer participate in the undertaking so they understand they can no longer expect his participation" was too "circumscribed" because it limited the possibility of withdrawal to "impractical" methods (slip op. 39). Here, however, the district court used no such rigid language, stating only that petitioner had to establish withdrawal by "affirmative evidence" and noting that "making a clean breast of his involvement * * * or an indication of abandonment to the other co-conspirators, reasonably calculated to reach their knowledge" establishes withdrawal.[3]

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[3] We would also point out that petitioner asserted a defense of non-involvement and did not offer any evidence of withdrawal. He thus failed to establish withdrawal from the conspiracy under any standard.

Nor is there any reason for this Court to reexamine its decision in *Hyde*, as petitioner urges (Pet. 7). The doctrine that a defendant has the burden of proving affirmative action to withdraw from the conspiracy has been followed consistently. See, *e.g.*, *United States* v. *Mardian*, 546 F.2d 973, 978 n. 5 (D.C. Cir. 1976); *United States* v. *Bastone*, 526 F.2d 971, 987-988 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976). Indeed, this Court relied upon the *Hyde* doctrine in *United States* v. *United States Gypsum Co.*, *supra*, slip op. 40.[4]

2. Petitioner claims (Pet. 8) that the 52 month delay between the time the government had grounds to charge him with conspiracy and the time of his indictment deprived him of due process. This claim is likewise without foundation.

In *United States* v. *Lovasco*, 431 U.S. 783 (1977), this Court held that in order to establish a violation of due process based on pre-indictment delay, a de-

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[4] Petitioner's claim (Pet. 5-6) that the government did not establish his involvement in the conspiracy after 1971 is likewise without merit. Petitioner, not the government, has the burden of establishing his withdrawal from the conspiracy. Moreover, the government's evidence showed that petitioner continued to engage in the conspiracy. The June 1972 aborted delivery strongly suggested that petitioner again was acting as the New York connection for his former co-conspirators. Throughout the conspiracy, Busby continually referred to petitioner as the "New York connection". There was no suggestion that, aside from petitioner, Busby knew any other bulk purchaser of heroin. Most significantly, petitioner's home telephone number was found in the pocketbook of Busby's girlfriend when she picked up the heroin shipment in June 1972.

fendant must demonstrate not only that the delay violates "fundamental conceptions of justice" and offends "the community's sense of fair play and decency," but also that he has suffered actual "prejudice" as a result of the delay. *Id.* at 790. The court below properly found that petitioner had established neither element (Pet. App. 2a).

Petitioner raised the pre-indictment delay issue for the first time during trial (Tr. 912). At the request of the court, the government submitted post-trial affidavits[5] that, together with the evidence elicited at trial, established that the delay was due to the government's continuing investigation of petitioner.

In late 1972, after Hamman, Busby, Wilson, and Lenze were arrested in Seattle, the United States Attorney's Office in Seattle determined that the evidence against petitioner was insufficient to justify immediate prosecution. The government therefore decided to continue its investigation. In January 1973, customs inspectors found in petitioner's possession, as he returned to the United States from Europe, approximately $36,000 in cash that he failed to report as required by 31 U.S.C. 1101. As a result, the IRS began an investigation independent of the Seattle narcotics investigation. Later the IRS learned of petitioner's connection to the Seattle-based narcotics case, and it thereafter obtained additional information from the DEA. Petitioner's suspected nar-

[5] The four affidavits were from two DEA agents, an IRS agent, and the Assistant United States Attorney who prosecuted the case.

cotics smuggling established a likely source of income in the tax years under investigation. IRS agents continued to investigate petitioner's many expenditures and sources of income until the trial began.

In June 1975, DEA agents in New York were alerted by an informant that petitioner had been part of a narcotics importation scheme involving up to 25 kilograms of heroin per month, and they began a third investigation of petitioner. The informant's information led to additional evidence against petitioner. In July 1975, the IRS's Regional Counsel submitted a report to the Department of Justice recommending prosecution. In September 1975, a Staff Attorney with the Department of Justice prepared a report recommending prosecution, which was forwarded to the United States Attorney's Office for the Southern District of New York in early 1976. The results of the Seattle and the New York DEA investigations and the IRS investigation were part of the Department of Justice's analysis, and each contributed to the decision to indict petitioner in April 1977 on narcotics and tax evasion charges.

The district court found that, while the government may have had a *prima facie* case against petitioner in the Seattle case by 1972, it was "a rather weak one which probably would not have resulted in conviction." The court therefore concluded that further investigation was necessary and "did not violate 'fundamental conceptions of justice' . . ." (Appendix on Appeal 8a). The court of appeals correctly determined (Pet. App. 2a) that under these circumstances the delay was necessary to complete the gov-

ernment's investigation and was not for an improper purpose. Accord, *United States* v. *King*, 560 F. 2d 122, 129-130 (2d Cir.), cert. denied, 434 U.S. 925 (1977); *United States* v. *Matlock*, 558 F. 2d 1328, 1330 (8th Cir.), cert. denied, 434 U.S. 872 (1977); *United States* v. *Shaw*, 555 F. 2d 1295, 1299 (5th Cir. 1977). As this Court indicated in *United States* v. *Lovasco*, *supra*, 431 U.S. at 791-795, delay necessary to complete a valid investigation is not only proper but also is to be encouraged, because the government should, from the standpoint both of the public interest and of potential defendants, seek to avoid premature initiation of prosecutions.

In addition, the courts below correctly found that petitioner failed to establish any prejudice from the delay. Petitioner's vague assertion (Pet. 8) that as a result of the delay he "lost testimony of business associates who might have been able to testify" in his behalf is purely speculative. It is well-settled that such general claims are insufficient to establish prejudice. See, *e.g.*, *United States* v. *King*, *supra*, 560 F. 2d at 130-131; *United States* v. *Foddrell*, 523 F. 2d 86, 87-88 (2d Cir.), cert. denied, 423 U.S. 950 (1975); *United States* v. *Jackson*, 504 F. 2d 337, 338 (8th Cir. 1974), cert. denied, 420 U.S. 964 (1975). Petitioner's claim (Pet. 8-9) that at an earlier trial a government witness "might" have testified to a more exact date for his drug sale to petitioner, and that petitioner may have been able to prove he was in Europe at the time of the sale, fails for the same reason.

3. Petitioner also argues (Pet. 10) that he was prejudiced by an improper joinder of the tax-evasion counts with the narcotics conspiracy count.

The court below correctly held (Pet. App. 2a) that petitioner's failure either to object to the joinder or to move for severance of the counts resulted in a waiver of any claim of improper joinder. See *United States* v. *Green*, 561 F. 2d 423, 426 (2d Cir. 1977); *United States* v. *Goldberg*, 527 F. 2d 165, 173 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976); *United States* v. *Quinones*, 516 F. 2d 1309, 1312 (1st Cir.), cert. denied, 423 U.S. 852 (1975).

In any event, because the offenses charged in the indictments arose out of the same criminal acts and transactions and proof at separate trials would have overlapped, it is clear that joinder was proper. See Fed. R. Crim. P. 8(a), 14; see also *United States* v. *McGrath*, 558 F. 2d 1102, 1106 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978); *United States* v. *Roselli*, 432 F. 2d 879, 898-902 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). Evidence of narcotics purchases would have been admissible at a separate trial of the tax offenses to prove both a likely source of income and specific expenditures. See, *e.g.*, *Holland* v. *United States*, 348 U.S. 121, 137-138 (1954). Similarly, evidence of petitioner's expenditures of cash substantially in excess of his reported income would have been admissible at a separate trial of the narcotics charge as circumstantial proof of the profits of his criminal venture. See, *e.g.*, *United States* v. *Tramunti*, 513 F. 2d 1087, 1105 (2d Cir.), cert.

denied, 423 U.S. 832 (1975); *United States* v. *Schwartz*, 535 F. 2d 160, 165 (2d Cir. 1976), cert. denied, 430 U.S. 906 (1977); *United States* v. *Kenny*, 462 F. 2d 1205, 1219 (3d Cir.), cert. denied, 409 U.S. 914 (1972). Accordingly, joinder of the tax evasion and narcotics charges was entirely proper.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

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* Petitioner argues (Pet. 9-10) that the joinder prejudiced him because it permitted the prosecutor to engage in bad-faith questioning of a defense witness, Dr. Hewlett, who testified, in regard to the tax-evasion charges, that he loaned petitioner $5,000 (see Tr. 345-347). The prosecutor's questions about Hewlett's involvement in the narcotics scheme were not improper and could equally have occurred at a separate trial on the tax-evasion charges. See Fed. R. Evid. 607; *United States* v. *Kerr*, 464 F.2d 1367, 1372 (6th Cir. 1972). Clearly, in a separate trial on the tax evasion charges, the district court would have had discretion to permit impeachment of Hewlett during cross-examination through inquiry into his involvement with petitioner in the narcotics scheme.

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